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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 606

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

ATLANTIC COAST LINE R. Co., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Question Presented

Do Section 1336 of Judiciary and Judicial Procedure, 28 U.S.C. § 1336, and Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9), give district courts jurisdiction of suits by railroads which seek to set aside and annul the administrative and quasi-judicial findings of the Interstate Commerce Commission and reparation award-orders based thereon, or must the district courts dismiss such complaints for lack of jurisdiction on the ground that the aforesaid findings and orders can *only* be "reviewed" as a defense to shippers' suits if, as, when, and where brought under the provisions of Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2)?

Statutes Involved

With the addition of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, set forth in Appendix A hereof, the government statement of the statutes involved is acceptable to the respondents.

Statement

In *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 303 I.C.C. 25, and 311 I.C.C. 315 (R. 6-19), the Interstate Commerce Commission found the rates assessed on more than 600 carload shipments of phosphate rock from Prairie, Fla., to destinations in Illinois during the period from April 10, 1945, to December 31, 1950, unjust and unreasonable, and awarded reparation aggregating $8,889.76, with interest. By orders of the Commission (R. 18, 19) the railroads were "authorized and directed" to pay the reparation on or before August 28, 1961.

By complaint filed September 6, 1961 (R. 20-25) the respondents brought suit against the United States of America and the Interstate Commerce Commission in the United States District Court for the Middle District of Florida under the provisions of Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9), and Sections 1336 and 1398 of Judiciary and Judicial Procedure, 28 U.S.C. §§ 1336 and 1398, to enjoin, set aside and annul the administrative and quasi-judicial findings of the Commission in the aforesaid proceedings, as well as the award-order based thereon. Among other things, the complaint alleged that the Commission erred in failing to find the proceeding before it barred by the statute of limitations of the Interstate Commerce Act, 49 U.S.C. § 16(3), in failing to observe and properly apply its own rules of practice, and in allowing prosecution of a complaint seeking damages by a corporation which had been dissolved five years previously.

By answer filed on January 5, 1962 (Appendix B hereof), the Interstate Commerce Commission admitted, without qualification, all of the jurisdictional allegations of the complaint. However, on April 20, 1962, the Interstate Commerce Commission moved the court to dismiss the complaint "for lack of jurisdiction of the subject matter, or in the exercise of its equity discretion".

By answer made on January 12, 1962 (Appendix C hereof), the United States of America neither defended nor opposed the Commission orders, pointing out that "the Interstate Commerce Commission and the shipper have adequate statutory authority to defend the Commission's orders", that the Commission "will avail itself of the statutory authorization to interpose all defenses to the plaintiffs' charges possible of being interposed", and that "the shipper, if it so elects, may present its position through its own counsel".

The District Court denied the Interstate Commerce Commission's motion to dismiss on May 15, 1962 (R. 26).

On August 22, 1962, a suit was filed on behalf of the Thomson Phosphate Company in the United States District Court for the Southern District of New York, under the provisions of Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2), seeking damages based on the orders of the Commission heretofore referred to. By stipulation of the parties, that complaint is being held in abeyance pending final disposition of the instant proceeding.

On January 9, 1963, the Florida District Court found the reports and orders of the Commission unlawful and set them aside (R. 27-37).

The Interstate Commerce Commission appealed from the judgment of the District Court. It did not appeal the findings of the District Court on the merits, but only the question of the court's jurisdiction (R. 4).

On July 8, 1964, the United States Court of Appeals for the Fifth Circuit affirmed the decision and judgment of the District Court, holding that the District Court was correct in overruling the motion to dismiss, in sustaining the right of judicial review in that court under §§ 1336 and 1398, and in rejecting the contention that review had to be in the pending New York action. The Court of Appeals also concluded that the contention that the trial court having jurisdiction should nevertheless have declined to exercise it for equitable considerations was without merit (R. 59).

Summary of Argument

The issue in this case requires a determination "of the statutory mechanism for review in reparation award cases generally" (R. 55).

There are two separate and distinct aspects to a reparation order, the first an administrative finding that the assailed charges were unlawful in violation of the Interstate Commerce Act, the second a quasi-judicial finding as to the fact and amount of damage. In a Section 16(2) [49 U.S.C. § 16(2)] suit the administrative finding is "conclusive", the quasi-judicial finding is only *prima facie* correct, and only as to the latter does the carrier have a right to a judicial hearing. The administrative finding is general and every other shipper similarly situated can take advantage of the finding and order by appropriate proceedings before the Commission or the courts. *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247; *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662.

Section 1336 [28 U.S.C. § 1336], relating solely to Interstate Commerce Commission orders, confers original jurisdiction upon the district courts of any action to enjoin, set aside, annul or suspend, in whole or in part, *any order* of the Commission. Section 17(9) [49 U.S.C. § 17(9)] provides that when a petition for reconsideration of *any* decision,

order or requirement of the Commission shall have been made and denied, or otherwise disposed of, a suit to enjoin, suspend or set aside such decision, order or requirement, in whole or in part, may be brought in a court of the United States under the provisions of law applicable to such suits, but not otherwise.

Two doctrines have evolved as the test of judicial reviewability of Commission orders, one the doctrine of primary jurisdiction, the other the doctrine of administrative finality. *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125. The findings and order here under review satisfy that test.

An order dismissing a shipper's claim for damage is an order subject to challenge under Section 1336. Judicial review of such an order does not require a three-judge court. A suit to enjoin, set aside and annul a Commission finding and determination of unjustness and unreasonableness, and an order denying reconsideration thereof is one involving "the power of the district courts to review Interstate Commerce Commission orders determining the reasonableness of rates", and under Section 1336 and 17(9) judicial review is available whether the order relates to past or future rates, and that review is vested exclusively in the district courts. *United States* v. *I.C.C.*, 337 U. S. 426; *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202.

A Section 16(2) suit is not one for the enforcement or "review" of a Commission order. It is a suit for damages. *Lewis, Etc., Co.* v. *Southern Pac. Co.*, 283 U. S. 654, it is "a plenary suit for damages actually incurred by the plaintiff by reason of violation of the Act by the defendant as conclusively found by the Commission". *Lehigh Valley R. Co.* v. *Clark*, 207 Fed. 717. That section does not give district courts jurisdiction to enjoin, annul and set aside administrative findings of unlawfulness or orders based thereon. In a Section 16(2) suit the court can merely enter judgment for the plaintiff or for the defendant. It cannot annul and set aside the administrative findings and

orders based thereon. The stated purpose of Section 16(2) is "to discourage harassing resistance by a carrier to a reparation order", *St. L. & S. F. R. R.* v. *Spiller,* 275 U. S. 156, "to prevent interposition of pleas lacking merit and so coercively to bring about prompt payment of the Commission's awards" and "to penalize failure of carriers, having no defense, to pay damages in accordance with the terms of the Commission's findings and reparation orders." *Baldwin* v. *Milling Co.,* 307 U. S. 478. It was never the Congressional intent to make Section 16(2) a section under which administrative findings and reparation orders based thereon might be reviewed.

The history of the statutory review and enforcement procedures show that the exclusive method for review is in proceedings brought under the provisions of Sections 1336 and 17(9). In the Hepburn Act of 1906, 34 Stat. 584, Congress expressly authorized the bringing of suits against the Commission to enjoin, set aside or suspend *any order* or requirement of the Commission. The same all-inclusive "any order" provision appears in all subsequent relevant statutory enactments. Wherever a qualification or limitation with respect to the type of order involved was intended, it was made in clear language [28 U.S.C. § 2321; 49 U.S.C. § 16(12)].

The policies underlying the Interstate Commerce Act do not support the conclusion that Section 16(2) is a review section, much less "the exclusive method for review of reparation orders". Only if the administrative findings and order of the Commission are valid does a shipper have a cause of action for damages under Section 16(2) which entitles him to the advantages or benefits provided therein. Suits by railroads for review of administrative findings and orders under Sections 17(9) and 1336 do not deprive shippers of any advantage or benefit provided in Section 16(2).

Just as the Commission is a proper party to defend an order *denying* reparation, it is a proper party to defend administrative findings and orders *granting* reparation. Suits by railroads to enjoin, annul and set aside invalid findings and orders are essential under the doctrine of primary jurisdiction in order to insure uniform treatment of all shippers, which is the basic aim of the Act.

Argument

The issue in this case is important because it requires "the determination of the statutory mechanism for review in reparation award cases generally, not merely the machinery which would satisfy this particular case, as the Court of Appeals quite properly indicated (R. 55).* The nature and legal effect of administrative findings with respect to rates and charges on past shipments and of reparation orders based thereon are of real importance in the consideration and disposition of that issue.

In *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, a leading case on the doctrine of the primary jurisdiction of the Interstate Commerce Commission, this Court made it abundantly clear that there are two separate and distinct aspects to a reparation award or order, the first an administrative finding that the assailed rates and charges are unlawful in violation of the Interstate Commerce Act, and the second a quasi-judicial finding as to the fact and amount of damage. The court, speaking of a suit brought under Section 16(2) of the Interestate Commerce Act, 49 U.S.C. §16(2), said:

> "Such orders, so far as they are administrative are *conclusive,* whether they relate to past or present rates, and can be given general and uniform operation,

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* As the government brief indicates (p. 40), there are four similar cases presently pending in various district courts.

since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by § 16 of the act given its day in court and the right to a judicial hearing." (p. 258) (Italics added)*

In *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, which involved a suit under Section 9 of the Interstate Commerce Act, 49 U.S.C. § 9, for the recovery of damages based upon administrative findings in a proceeding before the Commission to which the plaintiff had not been a party, this Court said:

"But the proceeding before the Commission, to determine the reasonableness of the 2 cents advance, was not in the nature of private litigation between a Lumber Association and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. *The finding thereon was general in its operation and inured to the benefit of every person that had been obliged to pay the unjust rate.* Otherwise those who filed the complaint, or intervened during the hearing, would have

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* It is significant that where the administrative finding of unlawfulness is unjustness and unreasonableness the damage is the difference between the excessive rate and the rate declared to be just and reasonable. *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531; *L. & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217. Thus, in a Section 16(2) suit the only issue on which the carrier has "its day in court and the right to a judicial hearing", where the administrative finding is unjustness and unreasonableness, is the making of the shipments and the paying of the charges.

secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record and would have destroyed the very uniformity which that body had been organized to secure. The plaintiff and *every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order.* See *Abilene Case,* 204 U. S. 446; *Robinson* v. *B. & O.,* 222 U. S. 507; *Baer Bros.* v. *Denver &c.,* 233 U. S. 479, 489, and compare *Nicola* v. *Louisville & Nashville R.R.,* 14 I.C.C. 200(4), 205." (p. 665) (Italics added)

Thus, in a suit brought by a shipper for damages under Section 16(2) under the principles laid down by this Court the administrative finding of unlawfulness is "conclusive", and it is general in its operation and inures to the benefit of every other shipper similarly situated. Similarly, in a suit under Section 9 of the Interstate Commerce Act, 49 U.S.C. § 9, unless and until an administrative finding of unlawfulness is enjoined, suspended, annulled and set aside, every other shipper similarly situated is entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order.

That the Court of Appeals recognized and understood the significance and importance of administrative findings and reparation orders based thereon, as well as the settled law with respect to the general effect thereof as set forth in decisions by this Court, is clear from its decision (R. 55-56).

I.

The District Court Had Jurisdiction Of The Complaint

Section 1336, relating solely to Interstate Commerce Commission orders, confers original jurisdiction upon the district courts of any civil action to enjoin, set aside, annul or suspend, in whole or in part, *any* order of the Commission.

The language of Section 17(9) follows a similar pattern. It provides that when a petition for reconsideration of *any* decision, order or requirement of the Commission shall have been made and denied, or otherwise disposed of, a suit to enjoin, suspend or set aside such decision, order or requirement, in whole or in part, may be brought in a court of the United States applicable to such suits, but not otherwise.*

Section 1398 expressly authorizes the filing of any civil action to enjoin, suspend, or set aside, in whole or in part, an order of the Interstate Commerce Commission in the judicial district wherein is the residence or principal office of any of the parties bringing such an action.

Moreover, not only does Section 1336 confer jurisdiction on the district courts, but this Court has held that "federal district courts have exclusive jurisdiction of suits to enjoin, set aside, annul or suspend an order of the Commission, and that in such suits the United States is an indispensable party". *Seaboard R. Co.* v. *Daniel,* 333 U. S. 118, 122.

Stated another way, Sections 1336 and 17(9) are the statutory provisions which create the right to institute a

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* Judicial review "is clearly guaranteed under the Administrative Procedure Act", as the lower court pointed out (R. 57). However, since it is general in nature, whereas Section 17(9) of the Interstate Commerce Act, 49 U.S.C. 17(9), and Section 1336 of the Judicial Code, 28 U.S.C. § 1336, are specific review provisions applicable in connection with orders of the Interstate Commerce Commission, that section will not be discussed herein.

suit to enjoin, set aside, annul or suspend *any* decision, order or requirement of the Commission. Those sections cover the full scope of judicial review, and the complaint of the respondents is clearly within their unrestricted provisions. Nothing in those sections even remotely suggests that the *right* there given to bring actions to enjoin, suspend, set aside or annul a decision, order or requirement of the Commission does not extend to and include administrative findings and orders of the Commission in which railroads are "authorized and directed" to pay reparation or to orders denying reconsideration of such findings and orders. Had it been the intention of Congress to so limit the right there given, it obviously would have been a simple matter for Congress to have done so by the inclusion of a phrase or clause restricting the application of those sections to "orders other than for the payment of money". It did so in Section 16(12) of the Interstate Commerce Act and it did so in Section 2321 of Title 28, where it provided for the three-judge procedure.

As a matter of fact this Court has already held that findings and orders relating to money damages are reviewable by a one-judge district court in a suit brought under the provisions of Sections 17(9), 1336 and 1398.

In *United States* v. *I.C.C.*, 337 U. S. 426, the United States as a shipper brought an action to set aside a Commission denial of reparation and an order dismissing the complaint. This Court held that the legal consequences of the order there assailed fell "squarely within the type made subject to judicial review by § 41(28)",* that a Commission order dismissing a shipper's claim for damages is an "order" subject to challenge under Section 1336, and that judicial review of such an order does not require a three-judge court.

In the dissenting opinion of Mr. Justice Frankfurter in that case, an attempt was made to read into the language

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* Now 28 U.S.C. § 1336.

of Section 17(9) by implication the words "provided the decision, order, or requirement is not one for money damages". That construction of the provisions of Section 17(9) was rejected by the majority of the Court, and it was completely abandoned in *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202.

In *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202, the plaintiff railroad brought an action against the United States of America and the Interstate Commerce Commission under the provisions of Sections 17(9), 1336 and 1398 to enjoin, set aside and annul a Commission finding that certain rates were unreasonable and a Commission order denying reconsideration thereof. The Commission determination was made in a proceeding after referral of the question to it by the Court of Claims. In a unanimous decision this Court characterized that case as one involving "the power of District Courts to review Interstate Commerce Commission orders determining the reasonableness of rates", pointing out (p. 205) that it had previously held that judicial review is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission, citing *Eldorado Oil Works* v. *United* States, 328 U. S. 12, and concluded that the plaintiff railroad was entitled to have the Commission order judicially reviewed and that jurisdiction to review such an order is vested exclusively in the district courts, citing 28 U.S.C. § 1336, and 49 U.S.C. § 17(9). The court also cited *Seaboard Air Line R. Co.* v. *Daniel,* 333 U. S. 118, 122, in which it stated that "federal district courts have exclusive jurisdiction of suits to enjoin, set aside, annul, or suspend an order of the Commission", and also that "in such suits the United States is an indispensable party". The Court also held that the order was "properly reviewable by a one-judge rather than a three-judge District Court because it was essentially one 'for the payment of money' within the terms of 28 U.S.C. 2321 and 2325, which exempt such orders from the

three-judge court procedure of 28 U.S.C. 2224", citing *United States* v. *I.C.C.*, 337 U. S. 426.

The jurisdiction of a district court to review orders of the Commission similar to the one here under attack was also considered by the Court of Appeals, Seventh Circuit, in *National Van Lines, Inc.* v. *United States,* 326 F. 2d 362 (1964), decided January 6, 1964. There the Interstate Commerce Commission, on its own initiative, had instituted an investigation to determine whether or not certain motor common carriers of household goods had charged, demanded, collected or received compensation for the transportation of shipments of household goods which were greater or less than, or different from, the rates applicable thereon as specified in the governing tariffs. The Commission found and determined the rates legally applicable on such shipments, that numerous respondents in the proceeding had failed to collect the legally applicable charges, and that the collection by any respondent of compensation greater or less than that on the basis therein found applicable constituted a violation of the Interstate Commerce Act.

Thereafter certain motor carriers filed a complaint in the District Court under Sections 17(9), 1336 and 1398, among others, seeking to set aside administrative findings of the Commission and a declaratory order based thereon. The District Court granted a motion of the United States and the Interstate Commerce Commission, the defendants therein, to dismiss the complaint.

On appeal, the Circuit Court of Appeals reversed the lower court. In doing so the Court of Appeals considered and dealt in considerable detail with a large number of cases involving the reviewability of administrative orders, including *Rochester Tel. Corp.* v. *U. S.,* 307 U. S. 125; *El Dorado Oil Works* v. *United States,* 328 U. S. 12; *United States* v. *I.C.C.,* 337 U. S. 426; and *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202. Although that case involved a question substantially similar to the one here involved,

neither the Commission nor the United States sought review of that decision by this Court.

In summary, it has been held that a shipper denied relief by the Commission may obtain judicial review of the denial order before a single-judge district court under the provisions of § 17(9) and § 1336. *United States* v. *I.C.C.*, 337 U. S. 426. It has been held that where a shipper brings a suit in a district court or a state court under the provisions of Section 9 of the Interstate Commerce Act, 49 U.S.C. § 9, or where the United States, as a shipper, interposes a counterclaim in a suit brought by the carrier in the Court of Claims, the Commission's findings on referral as to the justness and reasonableness of the rates may be reviewed in a one-judge district court "on suit of the *losing** party" under the same statutory proceedings. *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202. And now it has been held that even an order declaratory in nature, yet far less definitive of the rights and obligations fixed thereunder than those fixed by the administrative findings and order of the Commission involved in this proceeding, is likewise subject to review under those very same statutory provisions. *National Van Lines, Inc.* v. *United States*, 362 F. 2d 362.

The respondents respectfully submit that the findings and orders assailed in the instant complaint are substantially, and for all practical purposes, the same as those which were involved in *United States* v. *I.C.C.*, 337 U. S. 426; *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202, and *National Van Lines, Inc.* v. *United States, supra.* Those cases make it clear that administrative findings and orders relating to the payment of money are made reviewable by Section 17(9) and that under Section 1336 the district courts have jurisdiction to dispose of such complaints.

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* Italics supplied.

If an order denying reparation is an order for the payment of money and, as such, falls squarely within the type made subject to judicial review by Section 1336, as this Court held in *United States* v. *I.C.C.*, 337 U. S. 426, citing *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, and *El Dorado Oil Works* v. *United States*, 328 U. S. 12, it is inconceivable that an order granting reparation is not likewise one falling squarely within the type made subject to judicial review by Section 1336.

II.

Section 16(2) Is Not A "Review" Section

Section 16(1) of the Interstate Commerce Act provides that if, after hearing on a complaint, the Commission should determine that any party complainant is entitled to an award of damages for a violation of the act, "the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named". That paragraph makes it a mandatory duty of the Commission to issue such an order. *George Allison & Co.* v. *Interstate Commerce Com'n*, 107 F. 2d 180.

Section 16(2) provides that if a carrier does not comply with such an order, the complainant, or any person for whose benefit the order was made, may file a complaint in a United States District Court or in any state court of general jurisdiction, having jurisdiction of the parties, setting forth briefly the causes for which he claims damages, and the order of the Commission. The section further provides that such a suit shall proceed in all respects like other suits for damages, except that on the trial of such a suit, the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated.

A suit brought under the provisions of that section is not one for the enforcement or review of the Commission order. It is "a plenary suit for damages actually incurred

by the plaintiff, by reason of violation of the Act by the defendant as conclusively found by the Commission". *Lehigh Valley R. Co.* v. *Clark,* 207 Fed. 717, 724. This Court has also held that an action under § 16(2) is not one to enforce a reparation order; it is an action for damages. *Lewis, Etc., Co.* v. *Southern Pac. Co.,* 283 U. S. 654, 661.

Section 16(2) is and was clearly intended to be a special procedure which authorizes a complainant before the Commission to initiate a suit to recover damages "if a carrier does not comply with an order for the payment of money within the time limit in such order". The stated purpose of the statute was "to discourage harassing resistance by a carrier to a reparation order". *St. L. & S. F. R.R.* v. *Spiller,* 275 U. S. 156, 159. In *Baldwin* v. *Milling Co.,* 307 U. S. 478, this Court stated (p. 482), that "the Act unmistakably evidences purpose directly to prevent interposition of *pleas lacking merit* and so *coercively* to bring about prompt payment of the Commission's awards", citing *St. L. & S. F. R.R.* v. *Spiller, supra.* It further stated (p. 483) that "Sections 16(1) and 16(2) indicate legislative purpose to penalize failure of carriers, *having no defense,* to pay damages in accordance with the terms of the commission's findings and reparation orders".*

As a suit for *damages* rather than a suit to *enforce* a reparation order it does not come within the language of § 17(9) which states that "a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise".

In other words, the jurisdiction embodied in Section 1336 may not be availed of by a district court in a suit instituted under Section 16(2) because such a suit is not one "to

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* Italics added.

enforce, enjoin, suspend, or set aside orders of the Commission".

If, as this Court said in *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, the administrative findings are conclusive in a Section 16(2) suit, it must follow that district courts are without jurisdiction to review such findings and set them aside in Section 16(2) suits. As this Court held, at least inferentially, Section 16(2) is not a review section, but is simply a section under which an action for damages may be maintained. *Lewis, Etc., Co.* v. *Southern Pac. Co.*, 283 U. S. 654.

Section 16(2) does not give a district court jurisdiction to enjoin or set aside an administrative finding of unjustness and unreasonableness. Neither does it provide any procedure by which the Commission and the United States may be brought in as necessary parties. In fact, Congress has expressly withheld authority from the Commission to join as a party plaintiff in suits involving orders for the payment of money. 49 U.S.C. § 16(12). Moreover, without the power in a court of law to enjoin, suspend, or set aside administrative findings of the Commission it cannot be said that review, as that term is used in the Interstate Commerce Act, the Administrative Procedure Act, and the Judicial Code, is available to a party. Those statutes expressly include that element of review; Section 16(2) does not, because by its very language it is not a review section.

The uniformity, which is the principal aim of the Interstate Commerce Act and which is discussed in the *Mitchell* and *Phillips* cases, and many other cases of this Court, cannot be accomplished or assured unless the reviewing court also has jurisdiction to enjoin and set aside the administrative findings which are available to all shippers who have shipped under the condemned rates. Without such jurisdiction a district court can only dismiss the complaint if the administrative findings are held to be invalid or enter judgment if they are upheld. Neither the Commission

nor any other district court would be bound by any judgment entered by a district court.

Moreover, the problems created by the contention that Section 16(2) is a review section are compounded by the fact that the section also authorizes suits to be brought in state courts. That automatically raises serious questions of the dualism of the federal-state system, questions which require no discussion in this brief.

In any event, even if it be conceded, *arguendo,* that a carrier is entitled to limited "review" in a Section 16(2) suit, the fact still remains that, as the lower court pointed out (R. 56), "even 100% success in the § 16(2) suit leaves the carrier faced with unsatisfactory law for all to use, and unsatisfactory fact findings for all shippers to use".

The respondents respectfully submit that Section 16(2) is not a "review" section, much less one "exclusive of all other methods of review". They submit that Section 16(2) is simply a special provision which enables a complainant to initiate a suit for "damages" when a railroad does not comply with a reparation order of the Commission within the period of time fixed therein. They submit that the legislative purpose was "to discourage harassing resistance by a carrier to a reparation order", *St. L. & S. F. R.R.* v. *Spiller,* 275 U. S. 156, "to prevent interposition of *pleas lacking merit* and so *coercively* to bring about prompt payment of the Commission's awards", and "to penalize failure of carriers, *having no defense**, to pay damages in accordance with the terms of the commission's findings and reparation orders". *Baldwin* v. *Milling Co.,* 307 U. S. 478. They submit that it was never the intent of Congress to make Section 16(2) a section under which administrative findings of the Commission and orders based thereon might be reviewed, much less to make it "the exclusive method for review".

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* Italics added.

III.

The Government Arguments Lack Merit

The government concedes (p. 10), as indeed it must, that Section 1336 "does confer jurisdiction over 'any civil action to * * * set aside * * * any order of the Interstate Commerce Commission' ", and that the section "is broad enough in terms to include actions to set aside reparation orders as well as other Commission orders". It argues, however, that "the general words of the statute should not be applied literally to every instance within them, when to do so would work a result inconsistent with the legislative history, purpose and long-standing construction". It argues, as did the Commission in the District Court and the Court of Appeals, that "the exclusive method for review reparation orders is an enforcement proceeding brought by the shipper under Section 16(2)". It contends that is shown by the history of the statutory procedures, by the policies underlying the Interstate Commerce Act, and the understanding of the railroad industry and the federal courts.

That contention is wholly inconsistent with the position taken by the United States in *United States* v. *I.C.C.*, 337 U. S. 426, where it said in its brief (pp. 14-15) to this Court:

> "The Urgent Deficiencies Act confers upon the district courts original jurisdiction 'of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."[6]

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[6] This provision first appeared in the Mann-Elkins Act of June 18, 1910 (36 Stat. 539), whereby Congress established the Commerce Court and delineated its jurisdiction. By the terms of the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219), the Commerce Court was abolished and its jurisdiction was transferred to the district courts without any other substantial change. See *Standard Oil Co.* v. *United States*, 283 U. S. 235, 236-238.

28 U.S.C. 41 (28). That Act further provides that 'The jurisdiction of the district courts * * * shall be invoked by filing * * * a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought.' 28 U.S.C. 45. Section 17(9) of the Interstate Commerce Act provides, without any limitation on the right of any party, that 'any decision, order, or requirement' of the Commission may be reviewed by the courts (49 U.S.C. 17(9)). Thus the jurisdictional statutes here involved place no limitation, in terms, on the right of any party to bring and maintain actions to set aside the Commission's orders."

1. The History Of The Statutory Review And Enforcement Procedures Show That The Exclusive Method For Review Of Administrative Findings And Orders Based Thereon Is In A Proceeding Brought Under Sections 17(9) And 1336.

To begin with, the legislative and interpretive history of Sections 16(2), 17(9) and 1336, as it is set forth in the government brief, is incomplete and inadequate, since it ignores the doctrine of primary jurisdiction, the Congressional mandate expressed in the National Transportation Policy, and for the most part the previous interpretations of those provisions by this Court.

As the government correctly points out (p. 12), under the Acts of 1887, 24 Stat. 379, and 1889, 25 Stat. 855, no order was reviewable upon direct appeal, and the Third Circuit expressly so held as to reparation orders in *Western N. Y. & P. R. Co.* v. *Penn Refining Co.*, 137 Fed. 343, 354 (1905), affirmed 208 U. S. 208. During that period, however, the Commission's findings and order were subject to a right of the rail carriers to a trial *de novo* on all issues, including the administrative finding of unlawfulness of

the tariff rate or regulation. In *Western N. Y. & P. R. Co.* v. *Penn Refining Co., supra,* the court said:

"* * * To undertake to determine whether one, in suing for pecuniary reparation lawfully ordered by the commission, proceeds, on the one hand, for the enforcement of the lawful order of reparation, or, on the other, for the recovery of the reparation lawfully ordered, were to indulge in unprofitable refinement. It is enough for present purposes that in either view the substantial object of the action is the obtaining of reparation lawfully ordered to be paid. The law allows no appeal from a decision of the commission denying or awarding reparation, nor does a writ of error lie in such case. The lawfulness of an order of reparation does not necessarily depend upon a sufficiency of evidence adduced before the commission, but upon the existence of facts, whether or not disclosed to that body, warranting the reparation ordered; and in an action brought to obtain such reparation it is enough that such facts be established by proper evidence. Hence in such an action the parties are not confined to the evidence adduced before the commission during the investigation resulting in the order of reparation. They are at liberty either wholly or partially to rely upon the 'findings of fact,' made by the act prima facie evidence in any judicial proceeding 'as to each and every fact found,' or resort may be had by them or any of them to cumulative or other evidence. *Int. Com. Com.* v. *Alabama Midland Ry.,* 168 U. S. 144, 175, 18 Sup. Ct. 45, 42 L. Ed. 414; *Texas & Pac. Railway* v. *Interstate Com. Com.,* 162 U. S. 184, 196, 16 Sup. Ct. 666, 40 L. Ed. 940; *Kentucky, etc., Co.,* v. *Louisville & N. R. Co.* (C. C.), 37 Fed. 567, 614, 2 L.R.A. 289; *Int. Com. Com.* v. *Lehigh Val. R. Co.* (C. C.), 49 Fed. 177; *Int. Com. Com.* v. *Atchison, etc., R. Co.* (C. C.), 50 Fed. 295; *Int. Com. Com.* v. *East Tenn., etc., Ry. Co.* (C. C.), 85 Fed. 107, 110; *Int. Com.*

Com. v. *Cin., etc, Ry. Co.* (C. C.), 56 Fed. 925. The cause of action is examined de novo and the proceeding is in a qualified sense independent of the investigation by the commission. *Detroit, etc., Ry. Co.* v. *Int. Com. Com.*, 74 Fed. 803, 839, 21 C.C.A. 103; *Kentucky, etc., Co.* v. *Louisville & N. R. Co.* (C. C.), 37 Fed. 567, 615, 2 L.R.A. 289; *Shinkle, Wilson & Kreis Co.* v. *Louisville & N. R. Co.* (C. C.), 62 Fed. 690, 693; *Int. Com. Com.* v. *Cin., etc., Ry. Co.* (C. C.), 56 Fed. 925."

Thus, the findings and order sought to be enforced had only *prima facie* effect in the true meaning of the words.

"Prima facie" in Section 16(2) has long since had a different meaning. According to the decisions of this Court in *Mitchell Coal Co.* v. *Penna. R.R. Co.*, 230 U. S. 247, and *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, the administrative findings of the Commission are "conclusive" in a Section 16(2) or a Section 9 action, not merely *prima facie* correct.

The doctrine of primary jurisdiction is the result not of narrow technicalities of statutory construction of specific provisions of the Act, but rather the result of careful consideration of the Act in its entirety with a view toward accomplishing its principal purpose, namely, the promotion of uniformity and equality of rates and the elimination of unjust discrimination and undue preference or advantage. This purpose is now spelled out in the National Transportation Policy, which expressly mandates that "all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy".

This doctrine was first announced in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), wherein it was held that a shipper seeking reparation predicated upon the unreasonableness of an established rate must primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to

deal with questions involving the justness and reasonableness of established rates.

The doctrine was thereafter applied by this Court in *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 665, to a situation where the Commission's jurisdiction had already been invoked, the administrative finding being that the assailed rates were and are unjust and unreasonable, and a shipper not a party to the Commission proceeding relied upon that finding in an action for damages brought under Section 9 of the Act.

In *Mitchell Coal Co.* v. *Penna. R.R. Co.*, 230 U. S. 247, this Court discussed the doctrine in connection with the provisions of Section 16(2), stating that the administrative finding in such an action is conclusive in order that the finding may be given general and uniform effect.

Thus, under the theory which forms the basis for the primary jurisdiction doctrine, administrative findings of the Commission are conclusive and binding upon a court in actions instituted under Sections 16(2) and 9, the reason being that if the finding is not given uniform effect neither will the rate be given uniform effect. The only way the validity of those findings may be tested is in review actions brought under the provisions of Section 17(9) and Section 1336.

The Hepburn Act of 1906, 34 Stat. 592, for the first time provided for the direct review of Commission orders. Section 5 thereof expressly authorized the bringing of suits against the Commission to enjoin, set aside, annul or suspend *any order* or requirement of the Commission. The same all inclusive "any order" provision appears in the Mann-Elkins Act of 1910, 36 Stat. 539, 555, which created the Commerce Court, in the Urgent Deficiencies Act of 1913, 38 Stat. 219, which abolished the Commerce Court and transferred its jurisdiction to the district courts, in the Transportation Act of 1940, 54 Stat. 899, which added Section 17(9) to the Interstate Commerce Act and the 1948

Revised Judicial Code, 62 Stat. 931. Moreover, the statutes themselves reveal that when Congress intended to qualify the type of order referred to in any given instance it did so in clear langauge. It did so with respect to the type of order reviewable before a three-judge statutory court [28 U.S.C. § 2321], and with respect to the type of order which the Commission itself was given authority to enforce [49 U.S.C. § 16(12)]. Notwithstanding that legislative history, the government now asks this Court to read into the language of Sections 17(9) and 1336 the words "other than for the payment of money", and that despite the fact that this Court has already declined to do so on two occasions, first in *United States* v. *I.C.C.*, 337 U. S. 426, and then again in *Pennsylvania R. Co.* v. *U. S.* 363 U. S. 202. Significantly, in both instances the United States took the position that the words "any order" meant just that.

Throughout the portion of its argument dealing with the history of the statutory review and enforcement procedures, the government continually speaks of "self-executing orders" by which it presumably means orders which under the provisions of Section 16(12) can be enforced by the Commission itself. If that is what is meant by "self-executing orders", the government contention appears to be that only orders which are enforceable by the Commission itself are reviewable under the provisions of Sections 17(9) and 1336. However, that test of reviewability was clearly rejected in *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, where this Court evolved two specific doctrines limiting the judicial review of Interestate Commerce Commission orders, one "the primary jurisdiction doctrine", firmly established in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, the other "the doctrine of administrative finality". There, in discussing its decision in *Proctor & Gamble Co.* v. *U. S.*, 225 U. S. 282, this Court said:

> "Finally, the shipper was within the express language of Congress authorizing suits 'to enjoin, set aside,

annul, . . . any order of the Interstate Commerce Commission.' To be sure, the opinion in the *Procter & Gamble* case partly yielded to the Government's main contention in that case that the jurisdictional statute only applied where the order complained of was one which was to be enforced by the Commission. More recent decisions of this Court, however, have dispensed with this requisite for review, citing *Chicago Junction Case,* 264 U. S. 258; *Venner* v. *Michigan Central R. Co.,* 271 U. S. 127; *Colorado* v. *United States,* 271 U. S. 153; *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382; *United States* v. *Idaho,* 298 U. S. 105." (p. 136)

Moreover, in its brief to this Court in *United States* v. *I.C.C.,* 337 U. S. 426, the United States contended that the order there involved, which certainly was not a "self-executing order", was "subject to review under the 'proper application of the combined doctrines of primary jurisdiction and administrative finality,' the test established by this Court 'as a touchstone of jurisdiction to review the Commission's orders,' in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 142, 143". In upholding the government's contention, this Court said:

> "Third. 28 U.S.C. (1946 ed.) § 41(28) provides that 'The district courts shall have original jurisdiction • • • Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.' The legal consequences of this order if upheld will finally relieve the railroad of any obligations to the Government on account of the alleged unlawful charges; the order thus falls squarely within the type made subject to judicial review by § 41(28). *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 131-132, 142-143; *El Dorado Oil Works* v. *United States,* 328 U. S. 12, 18-19." (pp. 432-433)

Neither was the order under review in *Pennsylvania R. Co.* v. *U. S.*, 363 U. S. 202, a "self-executing" order. Actually, the "order" there under review was a finding by the Commission in *United States* v. *Penna. R. Co.*, 305 I.C.C. 259, 265, that the charges based on domestic rates on certain shipments were unjust and unreasonable. In its decision, this Court said:

> "We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 131, 132, 143. The record shows that the Commission order here meets this standard. The Commission found that the Railroad's domestic rates were 'unreasonable' as to 62 shipments. This order is by no means a mere 'advisory opinion,' its 'legal consequences' are obvious, for if valid it forecloses the 'right' of the Railroad to recover its domestic rates on those shipments. We have held that judicial review is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission. *El Dorado Oil Works* v. *United States,* 328 U. S. 12."

and, speaking of jurisdiction to review, said:

> "That jurisdiction is vested exclusively in the District Courts. 28 U.S.C. § 1336, 49 U.S.C. § 17(9). See *Seaboard Air Line R. Co.* v. *Daniel,* 333 U. S. 118, 122. Moreover, this order is properly reviewable by a one-judge rather than a three-judge District Court because it is essentially one 'for the payment of money' within the terms of 28 U.S.C. §§ 2321 and 2325, which exempt such orders from the three-judge procedure of 28 U.S.C. § 2284. *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, 441, 443."

Throughout its argument the government contends that Section 16(2) provides "the exclusive method for review of reparation orders", but it does not explain what it means by the term "review". Only three possibilities occur to the respondents.

The first is review within the meaning of Sections 17(9) and 1336, but that can have no application here because those provisions expressly confer power upon the district courts to set aside administrative findings and enjoin the Commission from enforcing them. Section 16(2) confers no such power upon the district courts. Neither does it provide any procedure by which the Commission and the United States may be brought in as necessary parties. In fact, Congress has expressly withheld authority from the Commission to join as a party plaintiff in suits involving orders for the payment of money. 49 U.S.C. § 16(12). Moreover, Section 16(2) authorizes suits to be brought in state courts, and the dualism of the federal-state system militates against any interpretation which holds that a state court has jurisdiction not only to "review" a federal administrative agency's determination but also to set it aside and enjoin its enforcement.

The second possibility is review in the sense that the carrier has a right to a trial *de novo* with respect to the administrative finding of unlawfulness. That interpretation conflicts squarely with the well settled doctrine of primary jurisdiction. *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247 and *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, have in effect ruled out a trial *de novo*.

The third possibility is review in the sense that the Court may examine the record before the Commission to determine whether or not the administrative finding is supported by substantial evidence on the record considered as a whole, and is otherwise in accordance with the law. This interpretation must be considered in the light of the district court's authority in a Section 16(2) suit. Since the statute does

not give it the power to set aside the administrative findings and enjoin their "enforcement", the district court can only dismiss the complaint if the administrative findings are held to be invalid or enter judgment if they are upheld. Neither the Commission nor any other district court would be bound by any judgment so entered. This interpretation is untenable because it militates against uniform treatment of shippers, rate-wise and service-wise, which is the principal aim of the Interstate Commerce Act, and which is discussed in and forms the basis for this Court's pronouncements made in the *Mitchell* and *Phillips* cases. In short, this interpretation, like the second, is governed by the pronouncement in the *Mitchell Coal* case that administrative findings in Section 16(2) suits are "conclusive", a pronouncement which is compelled by the Act's principal aim to treat all shippers uniformly. Moreover, this interpreation, like the first, cannot be supported by the language of Section 16(2) or its legislative history, and the government has made no attempt to do so.

As far back as 1911, in *Southern Ry. Co.* v. *United States*, 193 Fed. 664, the jurisdiction of the courts to annul reparation orders was upheld. In answering in the affirmative the question as to its jurisdiction to entertain such a suit under the Mann-Elkins Act, the Commerce Court said at pages 665 and 666:

> "The language which defines an order which may be affected by decree of this court is unrestricted; 'any order' which is involved in a direct suit to enjoin, set aside, annul, or suspend, provided always it is a case where a Circuit Court formerly possessed jurisdiction to annul, set aside, or suspend. And that prior to June 18, 1910, the Circuit Courts had jurisdiction is evident, for the language of section 16 of the interstate commerce act, as amended by the Hepburn Act of June 29, 1906, expressly vested in such courts power to hear and determine suits to enjoin, set aside, annul, or suspend *any* order of the Commission. *We cannot*

read into the clause which confers jurisdiction upon this court words of limitation other than those which formerly circumscribed the powers of the Circuit Courts, nor can we except from the described kinds of cases where injunction, annulment, or suspension may be had orders for the payment of money. The fundamental principle that Congress is presumed to have expressed its meaning with due deliberation, and that it is not within the power of the Court to go beyond the plain expressions of the Legislature, prevents the court from holding otherwise.

"We need go no further now than to hold that since the approval of the act creating this court, *a carrier which is ordered to pay damages, and which could have gone to the Circuit Court in equity to have such an order annulled or enjoined, has now the right to ask this court to enjoin or annul or suspend such an order,* provided always it can show grounds for equitable relief. And as the jurisdiction of this court over such a case is exclusive, it follows that no other court can entertain a bill in equity for the direct purposes of annulment or suspension as aforesaid." (Italics supplied)

And further at page 666:

"We are urged to adopt the view that when Congress excepted from the kinds of cases over which the Commerce Court may exercise jurisdiction the enforcement of an order for the payment of money, it could not have intended to authorize us to annul such an order; and it is said that when the Circuit Court tries an action at law to enforce such an order, that court necessarily has power to deny relief, on the ground that the order is illegal and void, and that therefore there is a destruction of that clause of the act which makes the jurisdiction of this court exclusive over cases to annul any order of the Commission.

> The difficulty with this reasoning lies in confounding these two propositions: On the one hand, an express affirmative denial of power to this court to try an action sounding in tort as does one to recover damage for excesses of rates collected as ordered by the Commission, wherein right of trial by jury must be preserved; and, on the other hand, *an express grant to this court of exclusive authority to hear and decide a petition brought to annul or enjoin an order of the Commission.*" (Italics supplied)

And concluded at pages 666 and 667:

> "The case in the Circuit Court is one to recover damages upon an order duly made by the Commission. True, a defense, among others available, may involve the validity of the order upon which plaintiff bases his action; but we need not dwell upon what questions may be presented in the Circuit Court, for we have no jurisdiction over them. It is plain, however, that *if such a defense is sustained in the Circuit Court, the ruling does not thereby affirmatively annul and set aside the order of the Commission; it merely determines that as between the parties before it the order is not a valid legal basis for the particular claim sought to be enforced.* In actual practice, where law and equity courts are invoked, there may arise some opportunity for varying views upon the validity of an order of the Commission. Surely, though, instances of divergencies will not happen more often than they do under any system where separation of law and equity obtains, *and in any event are not of such serious apprehension as to justify a construction of the statute which would subtract from the lawful authority deliberately conferred by Congress upon this court exclusively to enjoin, set aside, annul, or suspend, in whole or in part, 'any order' of the Commission.*" (Italics supplied)

The government attempts to minimize the importance of that decision by stating (p. 15) that it could not be appealed because it was dismissed on motion of the railroad. However, in *St. Louis & O'Fallon R. R.* v. *United States*, 279 U. S. 461 (1929), this Court expressly approved the distinction drawn by the Commerce Court between its jurisdiction to *enforce* an order of the Commission and its jurisdiction to *enjoin, set aside, or annul* such an order. The question in the *O'Fallon Case* was whether this Court had power by direct appeal to review the action of the lower court in a suit to *set aside* an order of the Commission which required the payment of money to the Commission under the recapture provisions of Section 15(a) of the Interstate Commerce Act. In holding that the suit to *set aside* the Commission's order directing the payment of money could be entertained by a three-judge district court and reviewed by this Court on direct appeal, the Court said:

> "The cause is properly here under the Judicial Code, as amended by Act of February 13, 1925 (U.S.C. Title 28, § 345)—
>
> 'Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts and not otherwise: . . .
>
> '(4) So much of "An Act making appropriations . . . for the fiscal year 1913, and for other purposes", approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money . . .'
>
> "The Act of October 22, 1913 (38 Stat. 219, 220), transferred to district courts the jurisdiction granted to the Commerce Court by Act of June 18, 1910 (36 Stat. 539); and provided for review by this court of

causes embraced therein. The jurisdiction of the Commerce Court included—

> 'First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.
>
> 'Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission . . .'

"Paragraph (4), sec. 238, applies to all those causes formerly cognizable by the Commerce Court and reviewable here. The words 'other than for the payment of money' were taken from clause First, Act of 1910, above quoted and, as there, they delimit the trial court's jurisdiction. They do not inhibit review here of any cause formerly cognizable by the Commerce Court. Moreover, the order under consideration was not merely for payment of money; and the proceeding below was to *set aside*, not to enforce it." (pp. 481-482) (Italics supplied.)

In pointing out the distinction, from a jurisdictional standpoint, between a proceeding to *set aside* an order of the Commission for the payment of money and a proceeding to *enforce* such an order, this Court followed the plain meaning of the language empowering the district courts to set aside *any* order of the Commission and applied precisely the same construction to that language as the Commerce Court placed upon it in the *Southern Railway Case*.

These specific holdings by the Supreme Court and by the Commerce Court that the district courts have original jurisdiction, based on the statute, of suits to enjoin, set aside, or annul orders of the Commission requiring the payment of money are not opposed by any judicial decision.

As the United States successfully contended at pages 14-15 of the brief filed on its behalf in *United States* v. *I.C.C.*, 337 U. S. 426, Section 17(9) provides "without any limitation on the right of any party, that 'any decision, order, or requirement' of the Commission may be reviewed by the courts" and Section 1336 confers upon the district courts original jurisdiction "of cases brought to enjoin, set aside, annul, or suspend in whole or in part any orders of the Interstate Commerce Commission".

Having there argued that Sections 17(9) and 1336 "place no limitation, in terms, on the right of any party to bring and maintain actions to set aside the Commission's orders", the present contention of the government that those sections do not authorize review of administrative findings and reparation orders based thereon is entitled to little or no consideration.

For the reasons hereinbefore given, the respondents respectfully submit that the history of the statutory review and enforcement procedures does not show that "the exclusive method for review of reparation orders is in an enforcement proceeding brought by a shipper under the provisions of Section 16(2)". On the contrary, they submit that the history of the statutory review and enforcement procedures show that the exclusive method for the review of "any order" is in an action brought under the provisions of Sections 17(9) and 1336.

2. The Policies Underlying The Interstate Commerce Act Do Not Support The Conclusion That The Exclusive Method For Review Of Reparation Orders Is In An Enforcement Proceeding Brought By The Shipper Under Section 16(2).

The government argues (p. 30) that the policies underlying the statute strongly support its conclusion that "the exclusive method for review of reparation orders is in an enforcement proceeding brought by the shipper under Section 16(2)". It contends that if railroads can sue to set

aside reparation orders, shippers will be placed at a serious disadvantage, that the Commission will be obliged to litigate numerous cases involving relatively minor issues, and that railroad suits to set aside reparation orders cannot be justified on other policy grounds.

(A) *Shippers Will Not Be Placed At a Serious Disadvantage.*

The government argues that in suits involving orders other than those for the payment of money the shipper has the option of intervening in support of the order or leaving the Commission to enforce its own order. It argues that in the case of an order for the payment of money only the shipper "can sue to enforce it", and that the only compensating benefits the shipper receives under Section 16(2) are a broad choice of venue, relief from court costs, except on his own appeals, and payment of attorney fees. The government argues that in a railroad suit to set aside a reparation order a shipper not only loses a choice of venue but may incur increased litigation costs and attorney fees.

The error in that contention is basic and clearly apparent. If the findings and order of the Commission are invalid as a matter of law, no shipper has any rights thereunder or is entitled to any of the "advantages" referred to. Only if the findings and order of the Commission are valid does a shipper have a valid cause of action for damages under Section 16(2) and a right to the procedural advantages provided therein. If the district court upholds the Commission's findings and order in a Section 17(9) suit by a carrier, the shipper is not denied his right to maintain an action under Section 16(2), nor deprived of any of its procedural advantages. On the other hand, if the reviewing court holds the Commission findings and order invalid and sets them aside, it automatically means that the shipper did not have a valid cause of action under Section 16(2) to begin with and, therefore, was neither

entitled to nor deprived of any procedural advantage. Moreover, as the decision of the lower court makes clear, under appropriate circumstances a shipper may obtain the benefit of all or part of those statutory advantages by intervening in the Section 17(9) suit. That is exactly what a number of successful shippers have done in *Baltimore and Ohio R. Co., et al.* v. *United States, et al.*, Civil Action No. 14897, D. Md., one of the suits referred to by the petitioner (p. 6). That suit seeks review of the administrative findings and orders of the Commission in 18 or 19 individual proceedings involving at least that many shippers or receivers located at various points throughout the United States who made shipments of various commodities from various origins to various destinations throughout the United States. The individual proceedings were consolidated by the Commission for disposition in one single report. A number of the complainants before the Commission have intervened in that court action on the side of the Commission and the United States, and at least two of them in addition to intervening on the side of the defendants have counter-claimed seeking "damages" under the provisions of Section 16(2).

As the United States stated in its answer to the instant complaint, "the shipper, if it so elects, may present its position through its own counsel". As the court below pointed out (R. 59), a decree sustaining the basic validity of the findings and order of the Commission would leave interested shippers in an even more advantageous position, since the only remaining issue in a Section 16(2) suit would be the limited issue of money damages, an issue which the railroads then would hardly be in a position to challenge. If the findings and order of the Commission fail to pass muster and are, therefore, "not in accordance with law", they may be set aside, and, as the lower court said (R. 58), "no one, whether Carrier or Shipper, will thereafter be subjected to the expense of useless litigation in numerous courts where separate § 16(2) shipper suits have been filed".

In deploring "the shipper's loss of his choice of venue" (p. 7), the petitioner overlooks the simple fact that if a shipper has a valid cause of action for damages under Section 16(2) he is at liberty to file his suit and avail himself of all of the procedural advantages provided for in that section, including "his choice of venue". Moreover, the venue provisions of Section 1398 are much narrower than those of Section 16(2), and are the identical venue provisions available to a shipper seeking judicial review of a Commission order denying an award of reparation.

(B) *The Commission Is The Proper Party Defendant In Suits Involving Its Own Orders.*

The government contends (p. 36) that Congress has made shippers, not the Commission, responsible for the "enforcement" of Commission orders, many of which would involve "minor issues limited to particular shippers which would be more appropriately litigated by the shippers themselves". That contention overlooks or ignores the basic distinction between a suit for "damages" under Section 16(2) and a suit to enjoin, annul or set aside the administrative findings and order of the Commission in any proceeding, whether it happens to involve reparation or not. Moreover, as the Court very aptly stated in *Malone Freight Lines, Inc.* v. *United States,* 204 F. Supp. 745, 754, "Many orders which might be termed minor by the Commission would undoubtedly be viewed as major by the aggrieved carrier". Many administrative findings and reparation awards seemingly minor when made thereafter become major because of a precedent established thereby, or because the administrative findings are sought to be applied in other cases.* In any event, it is clear that the

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* In *Harrison Construction Co.* v. *Pennsylvania R. Co.,* 280 I.C.C. 279, decided February 19, 1951, and *Grafton Coal Co.* v. *Baltimore & O. R. Co.,* 280 I.C.C. 435, decided March 21, 1951, the Commission found the charges assessed on ten carloads of motor

(Footnote continued on following page)

Commission is a proper party defendant in suits seeking to set aside orders of the Commission *denying* reparation, orders which from the government point of view undoubtedly likewise involve "minor issues limited to particular shippers". That being so, the respondents are completely at a loss to understand the apparent indignation of the government at the very thought that the Commission should be expected to defend its own administrative findings and orders *granting* reparation. Who, if not the Commission, should have the primary responsibility of defending its administrative findings and orders, and who is in as good a position or as well qualified to do so? As the lower court points out (R. 59) in a suit by a shipper under Section 16(2) "the sole spokesman in behalf of the ICC's order is the private party seeking partisan relief", whereas in a suit brought under the provisions of Sections 17(9), 1336, and 1398, the United States and the Commission are made defendants "directly and immediately responsible for * * * the advocative assertion of contentions deemed essential in the public interest".

(Footnote continued from preceding page)

vehicles shipped from two specific origins to two specific destinations between March and June, 1946, unjust and unreasonable and awarded reparation. Years later the United States made a post audit of freight bills covering shipments of motor vehicles made during the period from 1941 to 1946, from and to points throughout the United States other than those involved in the cited proceedings. Thereafter the General Accounting Office arbitrarily made deductions from railroad accounts aggregating millions of dollars on those shipments. Following prolonged further proceedings before the Commission, its prior findings were reversed in *Harrison Construction Co.* v. *Pennsylvania R. Co.*, 311 I.C.C. 521, decided November 7, 1960, and the charges on the ten carloads were found not shown to have been unjust or unreasonable. In *United States* v. *I.C.C.*, 221 F. Supp. 584 (1964), in an action brought by the Government under the provisions of Sections 17(9), 1336, 1398, and 1009, the court refused to set aside the report and order of the Commission, and granted a motion by the Commission and the intervening railroad defendants for summary judgment.

(C) *Suits By Railroads To Set Aside Reparation Orders Can Be Justified On Policy Grounds.*

The government argues (p. 36) that railroad suits to set aside reparation orders cannot be justified on policy grounds (1) because this Court's holding in *United States* v. *I.C.C.*, 337 U. S. 426, "was premised on the ground that no other mode of judicial review existed", and (2) because, contrary to the view of the Court of Appeals that unless a railroad can sue to set aside the findings and order of the Commission in a reparation proceeding it might be subject to a multiplicity of suits brought by shippers in different courts, "it is not clear that permitting railroads to attack reparation orders would decrease or increase the amount of litigation".

The answer to that contention is obvious.

Here again, no other mode of judicial review exists since Section 16(2) is not a "review" section. The order here under review, if upheld, will be followed by legal consequences, and thus falls squarely within the type made subject to judicial review. *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, 132; *United States* v. *I.C.C.*, 337 U. S. 426, 432. In any event, there is nothing in the language of this Court in that decision which purports to hold, as the government implies, that the exclusive method for review of reparation orders is in an enforcement proceeding brought by the Commission under Section 16(2), or is in conflict with the contention of the respondents.

Commenting on the "suggestion" of the Court of Appeals (R. 56) that railroads might be subjected to a multiplicity of suits brought by shippers in different courts, and conceding that to be a fact (p. 39), the government argues that "a multiplicity of suits might also result if several railroads were ordered to pay reparations to a single shipper and each were allowed to bring suit to set aside the order,

whereas only one suit to enforce the order could be brought". That argument overlooks or ignores the basic fact conceded by the government that "all other shippers similarly situated may sue on the orders under Section 16(2)". Even though such orders were made for the benefit of "a single shipper", any suit to set aside the Commission order would necessarily name the United States and the Commission as defendants, not the "single shipper" or "all other shippers". Obviously the lower court was more concerned with insuring uniform treatment of all shippers similarly situated than it was with the multiplicity of suits aspect.

Nor is there any basis for the contention (p. 39) that "each time a railroad sues to set aside a reparation order and loses, an additional action must still be brought by the shipper to enforce the order". It is highly unlikely that any railroad which failed in an action to set aside a reparation order in a judicial review proceeding would nevertheless subject itself to inevitable further failure in a Section 16(2) proceeding with the added result that it would thereby subject itself to the payment of costs and an attorney's fee.

In any event, railroad suits to set aside reparation orders are justified on grounds of policy. The very uniformity which is the principal aim of the Interstate Commerce Act, and which is discussed in the *Mitchell* and *Phillips* cases and many other decisions by this Court, cannot possibly be assured unless the reviewing court which finds the administrative findings and orders of the Commission in reparation proceedings invalid has jurisdiction to enjoin and set aside those findings and orders which otherwise remain available to "all other shippers similarly situated". Without such jurisdiction a district court or state court do no more than give judgment for the plaintiff or defendant.

3. The Understanding Of The Railroad Industry And Of The Federal Courts Does Not Support The Conclusion That The Exclusive Method For Review Of Reparation Orders Is In An Enforcement Proceeding.

The final contention of the Goverment is that the understanding of the railroad industry and of the federal courts supports the conclusion that "the exclusive method for review of reparation orders is in an enforcement proceeding". That contention overlooks or ignores the important fact that this Court had not definitively held that judicial review of Commission "determinations" involving the payment of money was proper until *El Dorado Oil Works* v. *United States,* 328 U. S. 12, *United States* v. *I.C.C.,* 337 U. S. 426, and *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202, decided 18, 15, and 4 years ago, respectively. Certainly there is nothing in the language of Section 17(9) or 1336 authorizing the application of those provisions where the Commission denies reparation to a shipper or receiver, or where it makes an administrative finding in a referral case, which does not likewise authorize the application of those provisions when the Commission makes an administrative finding and issues a reparation order based thereon. To hold otherwise would be completely illogical and unreasonable.

The government relies upon two cases in which the federal courts refused to entertain suits to set aside reparation orders on the alleged ground that such actions could not be brought. The first of those cases is *Pittsburgh & W. V. Ry. Co.* v. *United States,* 6 Fed. 2d 646, in which a three-judge court found the petition there under consideration failed to disclose equity and dismissed the complaint, but not "on the ground that an action cannot be brought to set aside a reparation order". As that court noted (p. 648), the petitioners therein invoked "the general equity jurisdiction of this court (as distinguished from its statutory jurisdiction with respect to matters arising before the Interstate Commerce Commission)", and on the sole ground

that the order there assailed, unless enjoined, set aside and annulled, would result in a multiplicity of suits. However, that case was decided in 1924, more than 16 years prior to the enactment of Section 17(9), and long before the decisions of this Court in *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, *El Dorado Oil Works* v. *U. S.*, 328 U. S. 12, *United States* v. *I.C.C.*, 337 U. S. 426, and *Pennsylvania R. Co.* v. *U. S.*, 363 U. S. 202.

The second case relied upon is *Baltimore & O. R. Co.* v. *United States*, 12 F. Supp. 261, a suit in equity before a three-judge court. The primary purpose of that action was to have Commission orders requiring the establishment of rates for the future set aside. The suit did ask the court "to review the reparation orders, as well as the rate orders", but the court refused to do so, again not on the ground that an action cannot be brought to set aside a reparation order, but on the ground (p. 263) that its jurisdiction as a specially constituted statutory court to review reparation orders was denied. Like the first case cited by the government, that case was decided prior to the enactment of Section 17(9), and prior to the decisions of this Court in *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125; *El Dorado Oil Works* v. *U. S.*, 328 U. S. 121; *United States* v. *I.C.C.*, 337 U. S. 426; and *Pennsylvania R. Co.* v. *U. S.*, 363 U. S. 202.

The government also relies on two decisions of this Court, *United States* v. *I.C.C.*, 337 U. S. 426, and *Porter Co.* v. *Central Vermont R. Co.*, 366 U. S. 272, in support of its contention that the courts "have assumed that Section 16(2) is the sole method for review of reparation orders". The respondents respectfully submit that in neither of those cases is any such assumption or implication to be found. Not a single word in *United States* v. *I.C.C., supra,* implies that such review is available "only" in an enforcement proceeding brought by the shipper under Section 16(2). Nor does it avail the government anything

to point out (p. 41) that "the dissenting Justices concluded that Section 16 is the sole basis of review for reparation orders and that the provision for suits to set aside Commission orders did not apply to orders denying reparations". It is highly significant that even Mr. Justice Frankfurter, the author of that dissent, joined in the unanimous opinion in *Pennsylvania* v. *United States,* 363 U. S. 202, which, of course, was in direct conflict with the conclusion of the dissenting justices in *United States* v. *I.C.C.,* 337 U. S. 426.

Finally, the government refers (p. 42) to *Washington Terminal Co.* v. *Boswell,* 319 U. S. 732. Contrary to the contentions of the government, that case did not involve provisions of the Railway Labor Act "which are closely analogous to Section 16(2)". As the Court of Appeals said (R. 57), "the resemblance is superficial". Under the provisions of the Railway Labor Act, 45 U.S.C.A. §§ 151, 153 First [p], the district courts are empowered to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce *or set aside* the order of the adjustment board. No similar sweeping authority is contained or implied in the provisions of § 16(2). Moreover, the procedure created by the Railway Labor Act is not subject to the provisions of the Administrative Procedure Act, 5 U.S.C.A. §§ 1001, *et seq.* As the lower court pointed out (R. 57), that is not the case here.

The respondents respectfully submit that for the reasons indicated, there is no merit to the contention of the government that the understanding of the railroad industry and of the federal courts supports the conclusion that "the exclusive method for review of reparation orders is in an enforcement proceeding". On the contrary, they submit it is clear that the understanding of the railroad industry and of the federal courts is that the exclusive method for the review of *any order* of the Commission, including a reparation order, is in a suit brought under the provisions of Sections 17(9) and 1336.

Conclusion

The respondents respectfully submit that the Court of Appeals properly concluded that the District Court was correct in overruling the motion to dismiss, in sustaining the right of judicial review in that Court under Sections 1336 and 1398, and in rejecting the contention that review had to be in the Section 16(2) suit pending in New York. They submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Certificate of Service

I, J. Edgar McDonald, attorney of record for the respondents in this proceeding, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing brief on the several parties to this action, as follows:

1. On the petitioner, the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorneys of record, Robert W. Ginnane, General Counsel, and Leonard S. Goodman, Assistant General Counsel, Interstate Commerce Commission, Washington, D. C. 20423.

2. On the United States of America, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorneys of record, Archibald Cox, Solicitor General, and Bruce J. Terris, Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530.

3. On The National Industrial Traffic League, by mailing copies in duly addressed envelopes to its attorneys of record, John F. Donelan and John M. Cleary, 700 Brawner Building, 888 17th Street, N. W., Washington, D. C. 20006.

This 16th day of April, 1965.

J. Edgar McDonald.
466 Lexington Avenue,
New York, N. Y. 10017.

APPENDIX A

Judicial Review

Sec. 10. [*5 U.S.C. § 1009.*] Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and venue of action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Interim relief.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

Answer of the Interstate Commerce Commission

(Title Omitted)

The Interstate Commerce Commission, one of the defendants in the above-entitled action, for answer to the complaint therein filed:

1. Admits the allegations of paragraphs I through IV.

2. Admits the allegations of the first two subparagraphs of paragraph V, denies the allegations of the third subparagraph, and alleges that all shipments involved in this proceeding originated on the Atlantic Coast Line R. Co. at Prairie, Florida, and the other plaintiffs were respectively the delivering carriers on all shipments on which the Commision allowed reparation in the orders appealed to this Court.

3. Admits the allegations of the first two subparagraphs of paragraph VI, and further admits that plaintiffs made the various contentions set forth in the third subparagraph before the Commission.

4. Admits the allegations of paragraph VII, except that defendant denies it disregarded any substantial or material grounds asserted by plaintiffs that might have warranted denying the shipper's requested relief. Defendant Commission alleges that the petitions for reconsideration filed by the railroads were denied by the entire Commission in its orders of July 23, 1958, and May 23, 1961; and further alleges that the parties were heard in oral argument following the further hearing before the examiner, in lieu of filing briefs, as shown in the report of Division 3, 311 I.C.C. 315, of September 28, 1960.

5. Denies the allegations of paragraphs VIII through XIV and of all subparagraphs thereunder.

Except as herein expressly admitted, the defendant denies each and every allegation contained in the complaint.

WHEREFORE, the defendant prays the complaint be dismissed.

APPENDIX C

Answer of the United States of America
(Title Omitted)

Now comes the United States of America, a defendant herein, and in answer to the Complaint says:

I.

This Complaint seeks to set aside certain orders of the Interstate Commerce Commission granting reparations to a shipper found to have been charged unreasonably high rates by the plaintiffs. The Interstate Commerce Commission and the shipper have adequate statutory authority to defend the Commission's orders. [28 U.S.C. § 2323].

II.

The Commission's orders challenged herein involve the same dispute and the same claim for money damages as were involved in the proceedings before the Commission. The Interstate Commerce Commission will avail itself of the statutory authorization to interpose all defenses to the plaintiffs' charges possible of being interposed. The shipper, if it so elects, may present its position through its own counsel. Under these circumstances, and in view of these facts, the United States does not participate in the defense of the Commission's orders but does not oppose them.

Accordingly, the United States neither admits nor denies any allegations of the Complaint.